

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 26, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1726

Cir. Ct. No. 2012CV54

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

BANK OF AMERICA NA,

PLAINTIFF-RESPONDENT,

V.

BARBARA E. ANDERSON AND THOMAS L. ANDERSON,

DEFENDANTS-APPELLANTS,

**OPTION ONE MORTGAGE CORPORATION, AMERICAN TITLE & ABSTRACT
CO., INC. AND CITIZENS COMMUNITY FEDERAL,**

DEFENDANTS.

APPEAL from an order of the circuit court for Eau Claire County:
JON M. THEISEN, Judge. *Affirmed.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Barbara and Thomas Anderson appeal an order denying a WIS. STAT. § 806.07¹ motion for relief from default judgment in a foreclosure action. We affirm.

¶2 Bank of America N.A., commenced the foreclosure action on January 23, 2012. Repeated attempts to serve process on the Andersons were unsuccessful. Substituted service by publication was made on April 23. On June 18, the Andersons filed a pro se “Answer to Complaint and Motion to Dismiss.” The circuit court granted default judgment on June 22. The court also granted a motion to strike the Andersons’ answer and motion to dismiss as untimely. Approximately one year after the default judgment was entered, the Andersons filed a motion for relief under WIS. STAT. § 806.07, seeking to vacate the default judgment. The court denied the motion and the Andersons now appeal.

¶3 WISCONSIN STAT. § 806.07 governs relief from judgments. Circuit courts have wide discretion in ruling on a motion to vacate a judgment. *See Hansher v. Kaishian*, 79 Wis. 2d 374, 389, 255 N.W.2d 564 (1977). Section 806.07(1) provides:

On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

....

(c) Fraud, misrepresentation, or other misconduct, of an adverse party;

(d) The judgment is void.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

¶4 In addition, WIS. STAT. § 806.07(2) provides, “The motion shall be made within a reasonable time, and if based on sub. (1) (a) or (c), not more than one year after the judgment was entered”

¶5 The Andersons argue the default judgment was void because it was “founded on a void invocation of personal jurisdiction.” *See* WIS. STAT. § 806.07(1)(d). The Andersons also insist they complied with the requirement in the publication summons to request a copy of the summons and complaint within forty days, and their responsive pleading was therefore timely. The Andersons further assert the affidavits supporting the motion for default judgment were based upon fraud, misrepresentation or other misconduct because Bank of America’s attorneys knew the publication summons provided the Andersons forty days to request a copy of the summons and complaint, but falsely stated to the court that the time for answering had fully expired. *See* WIS. STAT. § 806.07(1)(c).²

¶6 Bank of America responds that the Andersons failed to bring the motion for relief from judgment within a reasonable time as required by WIS. STAT. § 806.07(2). It notes the Andersons were served by publication on April 23, 2012, and had actual notice no later than May 21, as evidenced by the Andersons’ request for a copy of the summons and complaint following publication. The Andersons filed their answer and motion to dismiss on June 18, 2012, but did not file their motion for relief from the default judgment until June 19, 2013, fourteen

² The Andersons also claim “[i]f the Motion to Dismiss is denied, they are entitled to ten (10) days to file their Answer, Affirmative Defenses and Counterclaims.” Contrary to the Andersons’ perception, there is no statutory mechanism by which a party may insist upon repleading after the court grants a motion to strike an answer, as there may be with other pleadings such as a motion to dismiss. In any event, the Andersons had already filed an answer, which was combined with their motion to dismiss.

months after they were served and nearly twelve months after judgment was entered.

¶7 The Andersons fail to reply to this argument. Arguments not refuted are deemed conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶8 In addition, the Andersons never address the real issue inherent in their appeal regarding the purported fraud, misrepresentation or misconduct: whether the circuit court erroneously exercised its discretion when it denied their motion to vacate the default judgment. The Andersons' briefs to this court do not attempt to address the standard under which a court may consider a motion to vacate and reopen a judgment under WIS. STAT. § 806.07(1)(c). We will not abandon our neutrality to develop arguments. See *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶9 Moreover, we do not construe the Andersons' responsive pleading as raising a challenge to personal jurisdiction or the sufficiency of service of process. These defenses must be properly pled or are waived. See WIS. STAT. § 802.06(8)(a)2. Because the Andersons appeared and failed to properly raise in their motion to dismiss and answer the defense of lack of personal jurisdiction or the sufficiency of the service of process, the issues are therefore not appropriate on appeal.³

³ We note in this regard that the Andersons conceded in their principal brief to this court that they "voluntarily submitted themselves to the jurisdiction of the Eau Claire County Circuit Court just four (4) days before the Default Judgment was entered."

¶10 The Andersons also argue they were denied due process because they “have not yet had the opportunity to be heard on their defenses to this action.” However, the circuit court considered their answer and motion to dismiss, and ordered the pleading stricken. The Andersons appealed neither the order striking their answer and motion to dismiss, nor the foreclosure judgment. The circuit court properly exercised its discretion by denying the motion for relief from judgment.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

